Nos. 91-691 & 91-1045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JACK L. THULEN,

Petitioner,

v.

MARVIN BAUSMAN, Individually and in his official capacity as Sheriff of Carroll County, Illinois,

Respondent.

and

DERRELL E. UPTON,

Petitioner,

v.

BERNIE C. THOMPSON, Individually and in his official capacity as Sheriff of Kankakee County, Illinois,

Respondent.

Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE SEVENTH CIRCUIT PROPERLY CONCLUDED THAT THE PROHIBITIONS AGAINST POLITICAL AFFILIATION FIRINGS ESTABLISHED IN *ELROD/BRANTI* DO NOT APPLY TO ILLINOIS DEPUTY SHERIFFS WHO ACTIVELY CAMPAIGN AGAINST INCOMING SHERIFFS?

2. WHETHER THE SEVENTH CIRCUIT'S RESOLUTION OF THE FIRST AMENDMENT ISSUE CREATED AN INTER-CIRCUIT SPLIT OF AUTHORITY ON THE SCOPE OF PROTECTIONS ACCORDED DEPUTY SHERIFFS UNDER *ELROD/BRANTI*?

3. WHETHER THE SEVENTH CIRCUIT PROPERLY CONCLUDED THAT THE UNSETTLED STATE OF THE LAW ON POLITICAL FIRINGS OF DEPUTY SHERIFFS ENTITLED THE RESPONDENTS TO QUALIFIED IMMUNITY?

4. WHETHER THIS HONORABLE COURT SHOULD TAKE THIS OPPORTUNITY TO REVISIT THE FIRST AMENDMENT QUESTIONS DECIDED IN *ELROD/BRANTI* AND RETURN THE DISPUTE OVER PATRONAGE PRACTICES TO THE STATES?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

LAW REVIEW ARTICLES

STATUTES

RELEVANT STATUTES

Ill. Rev. Stat., ch. 125, para. 3 (1985) provides that:

> [The Sheriff] shall also, before entering upon the duties of his or her office, take and subscribe the oath or affirmation prescribed by section 3 of Article XIII of the Constitution, which shall be filed in the office of the county clerk of his or her county.

Ill. Rev. Stat. ch. 125, para. 9 (1985) provides that:

> Each deputy shall, before entering upon the duties of his or her office, take and subscribe an oath or affirmation, in like form as is required of sheriffs, which shall be filed in the office of the county clerk.

Ill. Rev. Stat. ch. 125, para. 12 (1985) provides that:

> Deputy sheriffs, duly appointed and qualified, may perform any and all the duties of the sheriff, in the name of the sheriff, and the acts of such deputies shall be held to be acts of the sheriff.

Ill. Rev. Stat. ch. 125, para. 13 (1985) provides that:

> The sheriff shall be liable for any neglect or omission of the duties of his or her office, when occasioned by a deputy or auxiliary deputy, in the same manner as for his or her own personal neglect or omission.

Ill. Rev. Stat., ch. 125, para. 17 (1985) provides that:

> Each sheriff shall be conservator of the peace in his or her county, and shall keep the same, suppress riots, routs, affrays, fighting, breaches of the peace, and prevent crime; and may arrest offenders on view, and cause them to be brought before the proper court for trial or examination.

Ill. Rev. Stat., ch. 125, para. 82 (1985) provides that:

> It shall be the duty of every sheriff, coroner, and every marshall, policeman, or other officer of any incorporated city, town, or village, having the power of a sheriff, when any criminal offense where breach of the peace is committed or attempted in his or her presence, forthwith to apprehend the offender and bring him or her before a judge, to be dealt with according to law; to suppress all riots and unlawful assemblies, and to keep the peace, and without delay to serve and execute all warrants and other process to him or her lawfully directed.

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SUMMARY OF ARGUMENT

Respondents' brief in opposition to Petitioners' petitions for *certiorari* is divided into four sections and begins with an analysis of the Seventh Circuit's conclusion that Petitioners' dismissals were permissible under the first amendment because deputy sheriffs occupy positions for which political affiliation is an appropriate requirement. To support that conclusion, Respondents focus essentially on the broad discretionary authority accorded a deputy's duties under Illinois law, and on the fact that these Petitioners engaged in active political opposition against the Respondents in the 1986 Sheriffs' elections in Carroll and Kankakee Counties.

In light of that active politicking, Respondents would have been justified in viewing with skepticism the prospect that such adversaries would effectively embrace the new Sheriffs' platforms and policies. When Petitioners' political activity is considered in conjunction with a deputy's broad statutory mandate, it is revealed that the Petitioners occupied positions which could predictably be utilized to hamper or thwart the new Sheriffs' efforts to implement his reforms. Accordingly, the Seventh Circuit correctly concluded that the first amendment does not require incoming Sheriffs to retain deputies who actively and publicly opposed their candidacies during an election campaign.

Section II addresses the Petitioners' contentions concerning an inter-circuit split of authority on the scope of first amendment protections afforded deputy sheriffs under *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980). While the conflicting signals emanating from the circuits provides a plausible basis for

this Court's review, Respondents suggest that no true conflict is presented by the facts of these cases. The Petitioners' participation in active political opposition to Respondents removes this case from the reach of decisions in the Fourth and Fifth Circuits which hold only that deputies may not be terminated on account of mere political affiliation, rather than political activity. For that reason, any uncertainty in the circuits need not be resolved under the facts of the instant cases.

Section III involves Petitioner Upton's request that this Court review the Seventh Circuit's grant of qualified immunity in favor of Respondent Thompson. Qualified immunity provides Respondent with an added layer of insulation from damages liability and can be overcome only by a showing that it was clearly established as a constitutional matter in 1986 that deputy sheriffs could not be fired for political reasons. Even if this Court questions the lower court's resolution of the underlying first amendment issue, the presence of two courts of appeals decisions upholding the dismissal of deputy sheriffs for political reasons should soundly defeat any contention that the law clearly prohibited such dismissals in 1986.

The final section of the brief is perhaps the most important and raises an issue which need be considered only if the Court chooses to grant the writs. Drawing on Justice Scalia's suggestion in *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, 2746-59 (1990) (Scalia, J., dissenting), Respondents contend that the federal courts' fifteen year foray into the arena of political dismissals has produced inconsistent results and caused a good deal of confusion for public employees and employers. Respondents further suggest that these problems stem not so much from mistakes encountered in applying *Elrod/Branti*, but rather, that they are attributable to the fact that only

through devices like civil service legislation and collective bargaining, rather than federal litigation under the first amendment, can an acceptable degree of certainty be achieved. For that reason, Respondents request that in the event the writs are granted, this Court should invite briefing and argument on whether the propriety of patronage practices should be returned to the wisdom of the various states. Respondents contend the question should be answered in the affirmative.

REASONS WHY *CERTIORARI* SHOULD BE DENIED

I.

THE SEVENTH CIRCUIT PROPERLY FOUND THAT ILLINOIS DEPUTY SHERIFFS MAY BE DISMISSED FOR ACTIVE POLITICAL OPPOSITION TO AN INCOMING SHERIFF.

To show that the Seventh Circuit erred in refusing to extend the protections of *Elrod/Branti* to deputy sheriffs, Petitioners argue that the Seventh Circuit usurped the jury's factfinding function in concluding that Illinois deputy sheriffs are policymakers vested with broad discretion in their duties and having direct input into and impact upon the Sheriff's policymaking functions. To evaluate the validity of that argument, we must begin by identifying the specific task facing the lower court in assessing the scope of *Elrod/Branti*. Only then can the propriety of the lower court's conclusions be decided.

In assessing whether a public official occupies a position within the protections established in *Elrod/Branti*,

both the Seventh Circuit and other Courts of Appeals have focused on the powers inherent in the position itself, rather than the duties performed by a particular occupant of the office. *See for example, Wrigley v. Greanias*, 842 F.2d 955, 958 (7th Cir.) *cert. denied*, 109 S.Ct. 132 (1988); *Jiminez Fuentes v. Torres Gaztambide*, 807 F.2d 236 (1st Cir. 1986) (*en banc*), *cert. denied*, 481 U.S. 1014 (1987); *Dickeson v. Quarberg*, 844 F.2d 1435, 1442 (10th Cir. 1988). Such an approach minimizes successive lawsuits by different occupants of the same position, provides job-holders with a higher level of certainty about whether a position is insulated against patronage firing, and allows employers the flexibility to vary a job-holder's duties without increasing the risk of litigation. *See* Martin, *A Decade of Branti Decisions: A Governmental Official's Guide to Patronage Dismissals*, 39 Am.U.L.Rev. 11, 38 (1989), *citing Greanias*, 842 F.2d at 958, and *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985).

Against a backdrop of that approach, we now consider the authorities available to the Seventh Circuit to guide its assessment of the duties performed by deputy sheriffs in Illinois counties. A brief review of those authorities fully supports the Court of Appeal's observation that Illinois deputy sheriffs are in a position to both fashion and frustrate a sheriff's policies. Specifically, deputy sheriffs perform a myriad of duties under Illinois law, including prevention of crime, arresting suspected criminals and keeping the peace. Ill.Rev.Stat. ch. 125, paras. 17, 82 (1985). Moreover, sworn deputy sheriffs take the same oath of office as Sheriffs (*Id.*, paras. 3, 9), and are empowered to perform any and all duties which the Sheriff himself performs. *Id.*, para. 12. Indeed, the acts of a deputy are deemed the acts of the Sheriff himself, who remains

statutorily liable for any of his deputies' negligent acts or omissions in the same manner as if they were his own. *Id.*, para. 13.

The broad scope of these duties reveals, without the need for a more specific factual inquiry, the importance of loyalty and cooperative teamwork between a Sheriff and his deputies. *See McMullen v. Carsen*, 754 F.2d 936, 939-40 (11th Cir. 1985) (need for high morale and internal discipline in law enforcement agencies); *Egger v. Phillips*, 710 F.2d 292, 325-28 (7th Cir.), (Coffey, J., concurring) (law enforcement agencies have paramount interest in teamwork, efficiency, cooperation, confidentiality and discipline), *cert. denied*, 464 U.S. 918 (1983). A new Sheriff should be able to depend upon his deputies for the enthusiastic coordination and implementation of policies and programs which served as the platform for his election. Indeed, Respondent Bausman's platform was especially critical of the Thulen administration and charged it with poor leadership and a lack of aggressive law enforcement (R. 29, Exhibit E).

In light of the preceding statutes and case law, the Seventh Circuit's general observations concerning the broad and discretionary nature of a deputy sheriff's duties were fully warranted. There was no need for a jury trial on the nature of a deputy sheriff's duties because those duties were readily ascertainable by reference to those authorities.

In concluding that the nature of a deputy's duties carries sufficient discretion and policymaking input so that an Illinois Sheriff is justified in removing political opponents, the Seventh Circuit did not write on a clean slate. Indeed, the Eleventh Circuit Court of Appeals has reasoned:

> To mandate that a Sheriff must accept the deputies that he finds in office simply because they belong to another political party even though he is totally re-

> sponsible for all their acts is incredible, and beyond the bounds of common sense.

Terry v. Cook, 866 F.2d 373, 377 (11th Cir. 1989), *quoting Whited v. Fields*, 581 F.Supp. 1444, 1456 (W.D.Va. 1984).

In *Whited*, Federal District Judge Glen M. Williams of the Western District of Virginia further opined:

> [T]here is no higher benefit in all our system of government than that of preserving the benefit of a person's vote. All else is vanity. For this court to say that Sheriff Fields must hire his opponents as deputies to carry out his policies is the same as declaring the 1983 general election in Russell County void.

Whited, 581 F.Supp. at 1457.

While *Terry* upheld deputy dismissals on account of mere political affiliation, the instant Petitioners' active political support of the incumbents and opposition to the incoming Sheriffs reveals an additional compelling justification for Petitioners' dismissals. Indeed, Petitioner Thulen, who served as his brother's chief deputy for thirteen years, was an outspoken supporter of his brother's candidacy, and assisted with the campaign by putting up signs and attending fundraisers. *Thulen v. Bausman*, 930 F.2d 1209, 1211 (7th Cir. 1991). Petitioner Upton served as the public spokesperson for the local union chapter which publicly endorsed Respondent Thompson's opponent, and evidenced his personal support of Thompson's opponent by displaying a bumper sticker on his vehicle. *Thulen*, 930 F.2d at 1210-11.

Such high profile political opposition would justify an incoming Sheriff to view with skepticism the prospect that those opponents would effectively embrace the new Sheriff's platform and policies. Accordingly, the Seventh Circuit appropriately refused to inhibit the Respondents' abil-

ity to aggressively and freely implement their reforms by handcuffing them to a staff of deputies publicly committed to the policies of a former administration which were rejected by the electorate. A contrary ruling would only have served to unduly interfere with the operation of the electoral process and the mandate of the voters. Indeed, even those circuits which hold that deputy sheriffs may not be terminated for political affiliation have conceded that the result may be different when the deputy sheriff moves beyond mere affiliation to active support of a particular candidate. *See Jones v. Dodson*, 727 F.2d 1329, 1338-39 (4th Cir. 1984); *Joyner v. Lancaster*, 815 F.2d 20, 24 (4th Cir.), *cert. denied*, 484 U.S. 830 (1987); *McBee v. Jim Hogg County, Texas*, 730 F.2d 1009 (5th Cir. 1984) (*en banc*).

Petitioner Thulen additionally faults the Seventh Circuit for even considering his political activity because Respondent Bausman has denied Petitioner's allegation that the decision to terminate was motivated by politics (Thulen's Petition, pp. 25-29). Petitioner suggests that Respondent may only rely upon his political activity if the Sheriff had asserted political activity as an affirmative defense to be resolved at trial.

This argument is ill-founded. It was Petitioner himself who alleged in his complaint that he was terminated on account of his active campaign support for his brother's candidacy in the 1986 Sheriff's election (R. 1, paras. 14, 17). Whether termination on account of such activity sufficiently sets out a valid constitutional claim is entirely separate from whether the defendant admits that the claim is factually sound. Notably, Petitioner Thulen does not dispute that he engaged in any of the political activity described by Respondent Bausman. In short, Respondent Bausman's denial of Petitioner Thulen's allegations of a

political firing does not entitle Petitioner to a jury trial if the claim does not set forth a cognizable constitutional violation.

II.

THIS COURT SHOULD NOT GRANT REVIEW ON THE BASIS OF AN INTER-CIRCUIT SPLIT OF AUTHORITY.

Petitioners correctly point out that both the Fourth and Fifth Circuits have held that deputy sheriffs do not occupy positions for which political affiliation is an appropriate requirement. *See Jones*, 727 F.2d at 1338; *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981), *cert. denied*, 465 U.S. 925 (1982). Importantly, however, both circuits have also recognized that an impermissible dismissal of a deputy sheriff for mere political affiliation might be constitutionally sound if the deputy became involved in political activity. *Jones*, 727 F.2d at 1338-39. *See also McBee*, 730 F.2d at 1014-17.

Expanding on the distinction between mere political affiliation and active politicking, the Fourth Circuit recently upheld the termination of a deputy sheriff whose vocal support of the Sheriff's opponent caused serious disruption in office morale. *Joyner*, 815 F.2d 20. In so doing, the Fourth Circuit recognized the deputy's "important role in the implementation of the Sheriff's policies" and the heightened need for "mutual confidence and loyalty" in a paramilitary unit. *Id.* at 24. Moreover, the *Joyner* court emphasized that a Sheriff need not wait for actual disruption to occur before acting:

> The combination of Joyner's vigorous campaign and his high position in the department created more than a potential for disruption; they actually created that

> disruption which would have sufficed for his discharge if it had only reasonably been apprehended.

Joyner, 815 F.2d at 24.

In *McBee*, the Fifth Circuit likewise recognized that a deputy's active campaigning puts him on a different plane than a deputy who is terminated for mere political affiliation. While political affiliation claims turn on an analysis under *Elrod/Branti*, the *McBee* court reasoned that claims involving politically active deputies must be assessed against the balancing test set forth by this Honorable Court in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). *McBee*, 730 F.2d at 1014.

Against that backdrop, it is revealed that neither the Fourth nor Fifth Circuits are in conflict with the Seventh Circuit's decision to uphold the dismissal of deputy sheriffs who actively campaigned for the defeated incumbent and against the new Sheriff. The absence of a conflict under such circumstances is not surprising. The Petitioners' active support of the defeated incumbents in hotly contested Sheriffs' elections is precisely the type of activity which creates a sufficient potential for interference with the new administrations' implementation of programs and policies to warrant replacing those individuals with the new Sheriffs' own supporters. One who lives and thrives by politics must also, unfortunately, often die by politics. *See Thulen*, 930 F.2d at 1218.

The Seventh Circuit's decision permitting Respondents to replace their political opponents with deputies of their own choosing was not unconstitutional under the analysis applied in the Fourth and Fifth Circuits. For that reason, these cases do not present a true inter-circuit conflict and Petitioners' petitions for writs of *certiorari* should be denied.

III.

THE SEVENTH CIRCUIT PROPERLY GRANTED QUALIFIED IMMUNITY IN FAVOR OF RESPONDENTS BASED UPON THE UNSETTLED STATE OF THE LAW AS APPLIED TO DEPUTY SHERIFFS.

The Seventh Circuit held that the unsettled state of the law as to the scope of first amendment protections afforded deputy sheriffs entitled the Respondents to summary judgment on the issue of qualified immunity. 930 F.2d at 1218. This conclusion was premised upon the absence of any controlling authority from this Court or the Seventh Circuit, and on an inter-circuit split on the issue in other jurisdictions. Even the four Seventh Circuit judges who dissented from the denial of rehearing *en banc* on the underlying first amendment issue conceded that "[t]he panel's decision on the qualified immunity issue is correct." *Thulen v. Bausman*, 938 F.2d 84, 86 (7th Cir. 1991). Indeed, Petitioner Thulen has not even asked this Honorable Court to review the qualified immunity issue. Only Petitioner Upton presses forward.

Governmental officials are immune from damages liability so long as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This Honorable Court more recently refined the test for qualified immunity and emphasized the need for a fact-specific, particularized focus to resolving immunity claims. *Anderson v. Creighton*, 483 U.S. 635 (1987).

In the context of a political termination case, the inquiry for purposes of a qualified immunity analysis should not be restricted merely to whether the law governing politically motivated firings was clearly established in general

terms at the time of the employee's discharge. *See Wrigley*, 842 F.2d at 958. Rather, the public employer should be entitled to qualified immunity if, at the time he acted, the law did not clearly "prevent [him] from discharging someone holding this particular position." *Id.* at 958. Against a backdrop of those principles, the Seventh Circuit's decision in favor of Respondents on the issue of qualified immunity was correct.

Prior to *Thulen*, neither this Court nor the Seventh Circuit had ever addressed whether the prohibition against political firings extended to deputy sheriffs in general, let alone to politically active deputy sheriffs. Furthermore, the presence of uncertainty in the other circuit courts of appeals on the scope of first amendment protections for deputy sheriffs is compelling evidence of the unsettled state of the law. *Compare Terry*, 866 F.2d 373 (deputy sheriffs not protected under *Elrod/Branti*) *and Joyner*, 815 F.2d 20 (politically active deputies may not be protected), *with Jones*, 727 F.2d 1329 (deputy sheriffs are protected under *Elrod/Branti*) *and Barrett*, 649 F.2d 1193 (same).

In light of the unsettled state of the law, there should be no dispute that where reasonable judges differ as to the application of a set of constitutional principles to a specific fact situation, a newly elected county Sheriff untrained in constitutional law should not be held to have violated a clearly established constitutional right.

Despite the conflicting signals from other circuits and the absence of binding authority from either this Court or the Seventh Circuit, Petitioner Upton continues to contest Sheriff Thompson's claim to qualified immunity. In so doing, Upton relies upon this Court's decision in *Elrod*, and

on the Seventh Circuit's decision in *Perry v. Larson*, 794 F.2d 279 (7th Cir. 1986). Upton also cites the Fourth Circuit's decision in *Jones*, the Fifth Circuit's decision in *Barrett*, and the fact that Kankakee County had adopted a Sheriff's Merit Commission system which should have alerted Respondent Thompson to the impropriety of utilizing political considerations in employment decisions.

None of the authorities cited by Petitioner Upton indicate that the law with respect to political termination claims brought by deputy sheriffs was clearly established in December of 1986. First, in *Elrod*, this Honorable Court addressed claims advanced by four ministerial workers in a Sheriff's Department of approximately 3,000 employees. *See Elrod*, 427 U.S. at 377 (Powell, J., dissenting). Though Petitioner Upton contends that *Elrod* itself involved a deputy sheriff (Upton's Petition, pp. 27-28), the only deputy involved in that case was a process server, who, as his title reveals, occupied a ministerial role. *Elrod*, 427 U.S. at 350-51.

In addition, Petitioner Upton actively supported the incumbent in the 1986 Sheriff's election. This political campaigning removes his claim from the umbrella of *Elrod*, which involved a large scale patronage machine which targeted all non-civil service employees who failed to pledge allegiance to the democratic party. *Id.* at 351.

Petitioner Upton's active politicking also undercuts his reliance upon the Fourth Circuit's decision in *Jones*, where the court specifically recognized that an impermissible dismissal on account of mere political affiliation might be constitutionally sound if the plaintiffs were involved in political activity. *Jones*, 727 F.2d at 1338-39. *See also Joyner*, 815 F.2d at 24.

Petitioner's reliance upon the Fifth Circuit's decision in *Barrett* is similarly flawed. Though *Barrett* held that Texas deputies may not be fired for mere affiliation, the Fifth Circuit subsequently retreated from that position where politically active deputies are concerned. *See McBee*, 730 F.2d 1009. As indicated previously, the *en banc* Fifth Circuit concluded in *McBee* that politically active deputy sheriffs could be subject to termination under a first amendment free speech balancing test. *Id.* at 1014.

Petitioner's citation to *Perry* is also misplaced. In that case, the Seventh Circuit reviewed a jury verdict in favor of a deputy sheriff who proved he was fired for political reasons. In affirming the verdict, the Seventh Circuit focused solely on causation, rather than examining whether deputy sheriffs are proper plaintiffs in political firing cases. As the lower court reasoned in dismissing Petitioner's reliance upon *Perry*, "[t]he defendant Sheriff [in *Perry*] apparently did not raise and this court appropriately did not address the patronage issue or the immunity question, which would have required an *Elrod-Branti* analysis. . . ." *Thulen*, 930 F.2d at 1216.

Finally, Petitioner Upton's reliance upon the existence of a Merit Commission in Kankakee County which generally prohibited political firings is not persuasive for two equally compelling reasons. First, as the Seventh Circuit noted below, Petitioner Upton was a probationary deputy at the time of his dismissal, and, therefore, not subject to the protections accorded merited deputies under the Sheriff's Merit Commission. *Thulen*, 930 F.2d at 1210. Nonetheless, Petitioner Upton suggests that the mere existence of a Merit Commission system in the County should have alerted Respondent to the impropriety of using political considerations in making employment decisions. To the contrary, it seems more plausible that a reasonable

Sheriff would have viewed a probationary deputy's exemption from Merit Commission protections as an invitation to utilize whatever considerations he deemed appropriate in terminating a probationary deputy. Indeed, there is nothing in the Merit Commission statute which would have alerted a Sheriff to the fact that he could not use political considerations in making employment decisions concerning probationary employees.

Moreover, even if the statute could be read in the manner suggested by Petitioner Upton, such considerations are irrelevant. The inquiry for purposes of a qualified immunity analysis is whether the constitutional principles at issue were clearly established in December of 1986. While Kankakee County's decision to adopt civil service protections might add certainty to the status of certain employment positions, it contributes nothing to the clarity of first amendment jurisprudence in 1986.

For the foregoing reasons, the Seventh Circuit's grant of qualified immunity in favor of Respondents was correct. *Accord Matherne v. Wilson*, 851 F.2d 752, 756-59 (5th Cir. 1988) (law did not clearly prohibit political dismissal of small county deputy in 1983).

IV.

IF CERTIORARI IS GRANTED, THIS HONORABLE COURT SHOULD RETURN THE DISPUTE OVER PATRONAGE EMPLOYMENT PRACTICES TO THE STATES.

In the event this Honorable Court chooses to grant the writs, Respondents request that the Court invite briefing which addresses the continued viability of the federal courts' foray into the arena of political dismissals. As suggested by Justice Scalia in *Rutan*, 110 S.Ct. at 2746-59 (1990) (Scalia, J., dissenting), the past fifteen years since

Elrod have produced inconsistent results and caused confusion for public employees and employers seeking to ascertain with some degree of certainty whether a particular job is protected from patronage considerations. During those years, scores of cases have been litigated over the elusive concept of whether a particular position is one for which political affiliation is an appropriate requirement. No clear approach has emerged from those efforts. *See* Martin, *supra*, p. 4, 39 Am.U.L.Rev. at 23-47 (1989) (cataloging the circuits' treatment of patronage dismissal cases).

Contrasted with the confusion encountered by the courts in applying *Elrod* and *Branti* is the comparative certainty provided by state civil service systems and negotiated contracts. While certainly not a panacea for public employees, such legislation and agreements at least give both public employees and employers an idea of where they stand with respect to job protections. By returning to the states the right to determine which types of jobs are exempt from patronage practices, public employees will know in advance the risks associated with seeking particular jobs. They will no longer be forced to serve in positions without knowing whether they can be fired by a new administration. Public employers will likewise benefit from knowing which jobs may be promised to political supporters, which may be taken from political opponents, and which must be left alone.

Respondents understand that persuasive reasons supported the decisions in *Elrod*, *Branti* and *Rutan*, and that the resolution of these constitutional questions is not as simple as the preceding discussion suggests. Nevertheless, a groundswell of courts and commentators favor returning the issue of patronage practices to the states. *See for example Political Patronage and the First Amendment:*

Rutan v. Republican Party of Illinois, 110 S.Ct. 2729 (1990), 14 Harv.J.Law & Pub. Pol. 292, 302 (1991) (state legislatures are better suited to determine the political requirements of the endless array of jobs in a particular state's government); Bhagwat, *Patronage and the First Amendment: A Structural Approach*, 56 U.Chi. L.Rev. 1369 (1989) (any balancing of competing interests in political patronage context should be left up to the legislature and not the judiciary). Notably, some lower courts in straining to apply *Branti* have paid deference to state civil service legislation. *See for example Stott v. Haworth*, 916 F.2d 134, 142 (4th Cir. 1990) (North Carolina statute exempting plaintiffs from civil service status created presumption that discharge or demotion was proper as a matter of law); *Savage v. Gorski*, 850 F.2d 64, 69 (2nd Cir. 1988) (interests of federalism and conservation of judicial resources better served by giving substantial deference to civil service legislation); *Jimenez Fuentes*, 807 F.2d at 246 (although not dispositive, a legislature's classification of civil service personnel is entitled to some deference in an *Elrod/Branti* analysis).

If *certiorari* is granted, Respondents suggest that the Court will benefit from full briefing and argument on the issue of whether the first amendment should continue to be construed so as to generally prohibit political patronage in government employment. The issue was neither briefed nor argued in *Rutan*, and still, four justices expressed their disagreement with the current state of constitutional law in this area. For the foregoing reasons, Respondents respectfully request that, in the event the petitions for writs of *certiorari* are granted, this Court take the opportunity to revisit and reassess the current state of first amendment jurisprudence in the context of patronage practices.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the petitions for writs of *certiorari*. In the event, however, that the Court chooses to grant the writs, Respondents request that this Honorable Court take this opportunity to return the question of the propriety of patronage dismissals to the various states.

Respectfully submitted,

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